EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the State Department violated 8 U.S.C. § 1152(a)(1), which prohibits discrimination on the basis of nationality in the issuance of immigrant visas, when it adopted a policy requiring Vietnamese nationals residing in Hong Kong who seek visas under a congressionally established family reunification program to return to the Socialist Republic of Vietnam to have their visas processed and issued, while not imposing a comparable requirement on nationals of other countries.

2. Whether, in the absence of a congressional delegation of authority, in adopting such a policy, the State Department unconstitutionally discriminated on the basis of national origin against U.S. citizens in the exercise of their congressionally conferred right to be reunited in the United States with their immediate families.

3. Whether the State Department's adoption of such a policy was arbitrary and capricious in violation of 5 U.S.C. § 706(2) where (a) the new policy was an unexplained and sudden reversal of the visa issuance policy the Department had followed in Hong Kong for over 14 years, (b) the new policy was in violation of the Department's regulations in effect at the time and was a departure from the Department's consistent practice for over 40 years regarding the place of visa processing and issuance, and (c) the Department's *post hoc* justification for the new policy contradicted the Department's earlier statements.

4. Whether a U.S. citizen and his Vietnamese national daughter who are adversely affected and aggrieved by the Department's policy reversal may seek judicial review under the APA of their claims that the Department's new policy violates the anti-discrimination prohibition of 8 U.S.C. § 1152(a)(1), exceeds the Department's statutory authority under the INA, and was arbitrary and capricious in violation of 5 U.S.C. § 706(2), where nothing in the INA expressly precludes such judicial review.

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Respondents Legal Assistance for Vietnamese Asylum-Seekers, Inc. ("LAVAS"), Em Van Vo ("Mr. Vo") and Truc Hoa Thi Vo ("Ms. Vo") request that this Court affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves § 202(a)(1) of the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. § 1152(a)(1); the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702 and 706(2); and the Fifth Amendment of the United States Constitution. These provisions are set forth in the attached statutory appendix.

STATEMENT OF THE CASE

Hong Kong's Detention And Screening Of The Boat People. Since April 1975, when North Vietnamese forces captured Saigon, large numbers of refugees have escaped political oppression and economic privation in the Socialist Republic of Vietnam ("Vietnam") by taking a dangerous journey across the open sea to Southeast Asia and Hong Kong. JA 67-69. For nine years, from June 1979 until June 1988, the treatment of these Vietnamese "boat people" was guided by an informal arrangement under which Hong Kong and other nations in the region granted the boat people temporary refuge ("first asylum") in exchange for a commitment from the United States and other western countries to resettle them. As part of this agreement, the Hong Kong Government ("HKG") accorded the boat people presumptive refugee status. JA 68.

This relatively benign treatment of the boat people changed dramatically in 1987-88, when a new wave of refugees fled Vietnam. The HKG responded by announcing that as of June 16, 1988, it was revoking the presumptive refugee status of Vietnamese boat people, and that all new arrivals would be detained and screened by local immigration authorities to determine on a case-by-case basis whether they qualified for refugee status. JA 69. One year later, in June 1989, the screening program was memorialized in an informal multilateral

arrangement known as the Comprehensive Plan of Action ("CPA").[1]

Thus, since 1988, the HKG has regarded newly arriving boat people as illegal aliens and has placed them in large prison-like detention centers surrounded by high chain link fences topped with rolls of barbed concertina wire. JA 71. These squalid detention centers are characterized by intense overcrowding, complete lack of privacy, unremitting boredom, extreme noise and heat, and the constant threat of rape, robbery, extortion, and other forms of physical violence. JA 71; JA 159-62.

The State Department's Practice Prior To April 1993. Since at least 1979, the United States has permitted Vietnamese boat people to enter the United States on either of two tracks: as refugees under the criteria later codified in the Refugee Act of 1980, Pub. L. 96-212, or as beneficiaries of immigrant visas under the criteria set forth in the INA, 8 U.S.C. §§ 1151-1156. JA 68-69; JA 106-07. This case relates only to the immigrant visa track.

The immigrant visa ("IV") option is available to the relatively small number of boat people who are sponsored to immigrate to the United States by a spouse, parent, child or sibling who is a citizen or permanent resident of the United States. In order to obtain an IV, the sponsoring U.S. citizen or lawful permanent resident (known as the "petitioner") must file a petition (Form I-130) with the Immigration and Naturalization Service ("INS"). 8 C.F.R. § 204.1(a) (1996). If the INS approves the petition, the alien visa applicant—the "beneficiary" of the petition—must submit to the State Department an application for an IV. 22 C.F.R. § 42.63(a) (1996). Once the visa application is deemed "current," the beneficiary must provide various documents to and must appear at a U.S. consulate for final processing of the visa

[1] The CPA has no formal legal status, having never been submitted to the U.S. Senate for confirmation nor made the subject of an Executive order. JA 69-70. Under its terms, if the immigration authorities of a first asylum state like Hong Kong determine that a Vietnamese applicant qualifies for refugee status, the United States is committed to work with other resettlement countries to assure his or her resettlement. With regard to Vietnamese boat people who are "screened out," however, the CPA expresses the position that they should return to their country of origin. JA 70.

application, including an interview before a consular officer, who must determine whether to grant the visa. 22 C.F.R. § 42.62(a).

For nearly 14 years, from June 1979 until April 1993, the Department, in accordance with the INA, processed IV applications for Vietnamese boat people in Hong Kong at the Consulate in that jurisdiction, whether or not their status was "illegal" (*i.e.*, screened out or not yet screened) under HKG immigration procedures. JA 68-69; JA 106-08; JA 116. This practice was consistent with the State Department regulations then in effect, which required that Department officials conduct an applicant's IV interview "in the consular district in which the alien resides" or in which he is "physically present." 22 C.F.R. § 42.61.[2] It is not disputed that respondent Ms. Vo and the other detained boat people are "residents" of Hong Kong within the meaning of the INA and both the former and the recently amended regulations. *See* 8 U.S.C. § 1102(a)(33) ("residence" is "the place of general abode," which, in turn, is defined as a person's "principal, actual dwelling place in fact, without regard to intent").

The implementation of the screening policy in Hong Kong in June 1988 and the adoption of the CPA in June 1989 did not alter the Department's practice. The Department continued to process Vietnamese IV applicants at the U.S. Consulate in Hong Kong, whether or not they had been "screened-in" as refugees by the HKG. JA 68-69; JA 134-35. In a cable dated December 14, 1990, the Department explained that to require the beneficiaries of current IV petitions who had been screened-out or who had not been screened-in to return to Vietnam for visa processing "strikes the Department as *procedural overkill and not at all necessary to preserve the integrity of the CPA*." JA 115-16 (emphasis added).

The State Department's April 1993 Policy Shift. In April 1993, the Department abruptly, and without notice to IV petitioners or beneficiaries, reversed its practice of processing IV applications for Vietnamese boat people at the U.S. Consulate in

[2] In response to this litigation, the Department amended its regulations on September 6, 1994 to give itself discretion to deny IV beneficiaries the right to have their visa applications processed in the place in which they reside or are physically present. 59 Fed. Reg. 39,555 (1994); 22 C.F.R. § 42.61(a) (1996). The 1993 and current regulations are set forth in the statutory appendix.

Hong Kong. JA 109; JA 150-51. Under the new practice, the Department refuses to process the current IV applications of any Vietnamese boat person who is illegally in Hong Kong, *i.e.*, who has not been "screened-in" by the HKG as a political refugee. In a letter to the HKG, the U.S. Consulate described the new policy as follows:

> We have received clear instructions from the Department of State in Washington, D.C., that we are only authorized to process the immigrant visa cases of persons recognized as refugees. We may not process the immigrant visa request of anyone awaiting a screening decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition.

JA 78-79.

In approximately December 1993, eight months after the change in policy, the U.S. Consulate started notifying current Vietnamese IV beneficiaries that they could not be processed in Hong Kong. JA 75. The standard letter stated:

> The U.S. government supports the [CPA] . . . Under the CPA, those not recognized as refugees . . . must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.

JA 82-91. The Department's reliance on the CPA was perplexing, since "all major resettlement countries," including Canada, Australia, Great Britain and the HKG itself (which has always cooperated with the U.S. Consulate's requests to interview detained IV applicants), did not consider the CPA a bar to processing immigrant visa applications in Hong Kong. JA 116-17. Although the CPA expired on June 30, 1996, the Department's policy remains in effect. Pet. Br. at 4.

The Department's requirement that boat people return to the country from which they fled left them without any viable option. A boat person who returns to Vietnam to have his IV application processed by a U.S. Consulate there will have that effort hampered by difficult, costly, corrupt and time consuming bureaucratic obstacles. JA 77; JA 116; JA 153-58. In a related case, the district court found that "substantial doubt" exists as to whether a

returnee to Vietnam will ever be able to "secure an exit visa" from the Hanoi regime. *Vo Van Chau v. United States Dep't of State*, 891 F. Supp. 650, 656 (D.D.C. 1995), *appeal dismissed as moot*, Order, No. 95-5205 (D.C. Cir. Oct. 19, 1995). *See also* JA 137-38; JA 143-46; JA 157. Even if they could have their visas processed in Vietnam without encountering any but the normal obstacles, the full process takes at least one year to complete, prolonging their separation from their U.S. family sponsors. JA 158. During this time, the returning applicants—who will have cut all of their ties with Vietnam before they fled and who may have no family to return to—will endure emotional trauma, discrimination and severe economic hardship. JA 76; JA 153-58.

The Situation Of The Named Respondents. Mr. Vo is a U.S. citizen and the father of Ms. Vo. Following the fall of Saigon in April 1975, Mr. Vo was arrested by communist security forces and imprisoned for fifteen months in a re-education camp as a result of his former service with the South Vietnamese Navy. JA 58. In June 1979, Mr. Vo escaped Vietnam by boat and, shortly thereafter, resettled in the United States as a political refugee. His entire family, however, was left behind. *Id.* Twelve years later, in July 1991, Ms. Vo fled to Hong Kong, where she has been detained ever since with her husband and two young children. JA 59.

In September 1992, the State Department processed the IV applications of Ms. Vo's mother, brother and sister—all of whom had escaped to Hong Kong at about the same time she did—at the U.S. Consulate in Hong Kong, and permitted them to immigrate to the United States based on their relationship with Mr. Vo. JA 59.

In April 1993, the INS approved the IV petition that Mr. Vo had filed on Ms. Vo's behalf so that she and her children could reunite with the rest of the family in the United States. Later that month, Mr. Vo was informed that Ms. Vo—like her mother, brother and sister before her—would be interviewed by the U.S. Consulate in Hong Kong and, if found eligible for the visa, "action will be taken to arrange for [her] departure from Hong Kong." JA 61-62. On December 15, 1993, however, the U.S. Consulate, pursuant to the policy shift the Department had made eight months earlier in April, informed Mr. Vo that it would not process his daughter's IV application unless and until she returned to Vietnam. JA 60.

The Proceedings Below. On February 25, 1994, Mr. Vo and his daughter, together with other individual plaintiffs and LAVAS, brought this class action against the State Department, challenging its April 1993 decision to cease issuing immigrant visas in Hong Kong to Vietnamese nationals who, like Ms. Vo, reside in detention centers in Hong Kong and who, like Ms. Vo, have been authorized to immigrate to the United States by the INS. The complaint alleged that the Department's new policy violated the Department's regulations then in effect, which mandated visa processing in the consular district in which the applicant resides. Respondents also alleged that the 1993 policy violated § 1152(a)(1) of the INA, which prohibits "discrimination in the issuance of an immigrant visa because of the person's ... nationality," the equal protection guarantee contained in the Fifth Amendment of the Constitution, and § 706(2) of the APA. JA 13-28.

Following a hearing that consolidated respondents' motion for a preliminary injunction with the trial on the merits,[3] the district court on April 28, 1994, issued a final order granting the Department's motion for summary judgment and denying respondents' cross motion for summary judgment. Pet. at 28a. The district court rejected respondents' argument that the applicable regulations required the Department to process their visa applications in Hong Kong. Despite the plain language and the Department's own interpretation of the regulation, the district court held that the regulation made the decision whether to process respondents' visa applications in Hong Kong a "policy choice" that is "entitled to deference." Pet. at 27a. In a single sentence, the district court also found "meritless" respondents' arguments that the Department's policy violated 8 U.S.C. § 1152(a)(1), the APA and the Constitution. *Id.*

On February 3, 1995, the D.C. Circuit reversed, holding that the Department's April 1993 policy was discriminatory because it drew an explicit distinction between Vietnamese nationals and the

[3] No evidence was heard at the hearing, which consisted of oral argument on cross-motions for summary judgment. Earlier, the district court had prohibited respondents from taking limited documentary discovery of the Department's cable traffic relevant to the decision to refuse IV processing, and from deposing a key witness pursuant to Fed. R. Civ. P. 30(a)(2)(C). JA 29.

nationals of other states: the Department had instructed the Consulate not to process the "immigrant visa petitions of *Vietnamese nationals* residing illegally in Hong Kong." Pet. at 12a. The court held that such discrimination violated § 1152(a)(1) of the INA, which "unambiguously direct[s] that no nationality-based discrimination shall occur." Pet. at 11a.[4] The court rejected the Department's suggestion that the line drawn was a "permissible line between legal and illegal immigrants," noting that "[t]he Department has never contended ... that this change was made as to any other nationals than Vietnamese nationals, nor that illegally present nationals of other countries would be treated the same as illegally present Vietnamese nationals." Pet. at 11a-12a.

The court also rejected the Department's suggestion that it retains discretion under § 1152(a)(1) to discriminate on the basis of nationality so long as its policies are rationally related to U.S. foreign policy interests. The court reasoned:

> Congress could hardly have chosen more explicit language. While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most compelling—perhaps a national emergency. We cannot rewrite a statutory provision which by its own terms provides no exceptions or qualifications simply on a preferred "rational basis."

Pet. at 9a. Having ruled in respondents' favor on the INA issue, the court did not address respondents' fully briefed APA and constitutional arguments.

The Department filed a petition for rehearing and suggestion for rehearing *in banc*. After remanding the record to the district court for a determination on a newly raised issue of mootness, the court of appeals on February 2, 1996, held that the case was not moot and denied the petition for rehearing. Pet. at 40a. On February 12, 1996, the full court denied the Department's suggestion for rehearing *in banc*. Pet. at 51a. The Department

[4] The D.C. Circuit concluded that the Department's amendment of its regulations in 1994 had rendered moot respondents' challenge based on the Department's consular venue regulations.

does not challenge before this Court the court of appeals' mootness determination.

SUMMARY OF ARGUMENT

I. Section 1152(a)(1) of the INA provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's sex, race, nationality, place of birth, or place of residence." The State Department is not free to ignore this legislative mandate simply because it considers its preferred policy administratively more feasible or more consistent with its own view of "foreign policy." Nevertheless, for just such reasons, the State Department refuses to process or issue at the U.S. Consulate in Hong Kong immigrant visas for Vietnamese nationals illegally in Hong Kong, and requires them to return to their country of origin to apply for and obtain their visas. Yet the Department permits nationals of other countries who are illegally in Hong Kong to apply for and obtain their visas at the Consulate in Hong Kong. As the court of appeals found, based on the Department's own statements, this policy draws "an explicit distinction between Vietnamese nationals and nationals of other countries," (Pet. at 9a), and thus discriminates against Vietnamese in the issuance of immigrant visas because of their nationality. Even if one accepts the Department's view that its policy is necessary to implement the CPA—a doubtful proposition—the policy necessarily has the express purpose of treating Vietnamese nationals differently from nationals of other states because, as the Department acknowledges, the CPA is directed at the "very specific problem" of the "migration of nationals primarily of one country," Vietnam. Pet. Br. at 47.

The Department claims that the term "issuance" refers only to the decisions of a consular officer to grant or refuse an immigrant visa to a specific individual, and thus that § 1152(a)(1) does not bar race, sex or nationality based discrimination at any other step in the process that comes before that decision. Nothing in the language or legislative history of § 1152(a)(1) supports this view. The statute prohibits "*discriminat[ion]* . . . in the issuance" of immigrant visas. However narrowly or broadly the word "issuance" is defined, discrimination in the process by which an IV beneficiary obtains a visa—*e.g.*, by imposing on a particular

race or nationality burdensome procedural requirements that make the procurement of such visas impossible or significantly more difficult—necessarily discriminates in the "issuance" of the visa. The Department's view would render § 1152(a)(1) entirely precatory: it would not prohibit discrimination at any point in the visa issuance process other than the consular officer's decision in a specific case; yet the consular officer's decision, according to the Department, would be unreviewable either by the Secretary or by the courts. If the Department were correct, the Secretary would be free to suspend indefinitely all processing of immigrant visas for a group of aliens purely on the basis of their race. This Court should construe § 1152(a)(1) in light of Congress' purpose to remove race, nationality and gender as a bar to family reunification, rather than in a manner that will deprive it of "operative effect."

II. The Department's policy violates the equal protection rights under the Fifth Amendment of Mr. Vo, a U.S. citizen. This case is unlike most immigration cases because it involves the rights of *U.S. citizens* to bring their immediate family members to the United States under a family reunification program established by Congress. The government may not unconstitutionally deprive citizens of the rights conferred by that program.

In singling out Vietnamese visa beneficiaries for discriminatory treatment, the Department's policy necessarily discriminates against their American sponsors on the traditionally "suspect" basis of national origin because (1) those sponsors almost invariably share the same national origin as their family members and (2) classifications that distinguish among American citizens on the basis of the race or national origin of family members are themselves constitutionally suspect. As such, the Department's classification is presumptively invalid, and the Department has the heavy burden of establishing that it is narrowly tailored to meet a compelling national interest. The Department does not even try to do so.

To be sure, this Court has long held that *Congress* has plenary and exclusive power in the formulation of immigration policy, including the power to make classifications concerning the admission of aliens that would be unconstitutional outside the realm of immigration. The Department is seriously in error,

however, when it says that the Executive Branch has the same power over immigration matters. The State Department has no constitutional authority to make such classifications, absent a clear delegation of such authority by Congress. Nothing in the language or the legislative history of the INA supports the conclusion that it grants to the Department the authority to discriminate on the basis of race, gender or national origin in the administration of the family reunification program. Both this Court and the government have acknowledged (*e.g.* in *Jean v. Nelson*) that a facially neutral provision of the INA vesting discretion in agency officials (like § 1202, granting the Department authority to make consular venue rules) does not authorize race, gender, national origin or nationality-based discrimination.

III. The State Department's 1993 policy shift was arbitrary and capricious. The Department processed in Hong Kong the IV applications of Vietnamese boat people for 14 years before it decided in April 1993 to stop doing so. The Department continued to process such applications after the CPA was adopted in June 1989, without regard to the IV beneficiary's status as "screened-in," "screened-out" or "unscreened." The pre-1993 policy was consistent with the Department's self-described "historical" practice of processing IV applications in the consular district in which the applicant resides. The Department's consular venue regulations as they existed from before the INA's enactment in 1952 to September 1994 (when the Department amended them in specific response to this lawsuit) *required* processing in Hong Kong. The only rationale the Department gave to explain its 1993 decision contradicts its own statement in 1990 that requiring screened-out IV beneficiaries to return to Vietnam for visa processing and issuance was "*not at all necessary to preserve the integrity of the CPA.*"

IV. The Department has not and cannot overcome the "strong presumption" that Congress intends judicial review of agency action, a presumption that this Court has applied consistently in cases arising under the INA. The fact that agency action may have foreign policy or political overtones does not divest the federal courts of their constitutional and statutory power to determine if agency action is outside of the agency's statutory authority, contrary to law, or arbitrary and capricious. The Department concedes that

nothing in the INA expressly precludes judicial review of the Department's discriminatory policy. The Department points to § 1105a of the INA, but that provision merely establishes a statutory review process for final orders of deportation and exclusion directed at individual aliens. The decisions of this Court and the courts of appeal make clear that § 1105a does not bar APA review of challenges to regulations and Department policies. Similarly, the doctrine of consular nonreviewability applies only to decisions by consular officers to grant or deny visas in specific cases, and, as numerous cases establish, does not preclude review of "general collateral challenges" to INS or State Department policies and procedures that touch upon the admission of aliens.

Although § 1202(a) of the INA grants rulemaking authority to the Secretary to establish the places at which visas will be processed, the Department's "consular venue" policies are not committed by law to its discretion, within the meaning of the "very narrow" exception to judicial review set forth in § 701(a)(2) of the APA. The statutory prohibition against discrimination in the issuance of immigrant visas necessarily limits the Department's discretion to engage in such discrimination. Even if the prohibition in § 1152(a)(1) were inapplicable, § 701(a)(2) bars judicial review only where Congress clearly intended to allow the agency to act without regard to judicially cognizable standards. Here, the Department's consular venue rulemaking authority is cabined by consistent Department practices, specifically endorsed by Congress, that establish objective criteria against which to judge consular venue policies.

In any event, whether or not respondents' challenges under the INA and APA are subject to judicial review, there can be no doubt that the federal courts may consider Mr. Vo's constitutional challenge.

ARGUMENT

I. THE STATE DEPARTMENT'S POLICY VIOLATES THE STATUTORY PROHIBITION AGAINST DISCRIMINATION IN THE ISSUANCE OF IMMIGRANT VISAS.

By requiring Vietnamese residents of Hong Kong to return to Vietnam before they can apply for and be issued an immigrant visa, while allowing Hong Kong residents of every other nationality to have their visas processed and issued in Hong Kong, the Department's policy plainly discriminates against Vietnamese nationals in violation of Section 1152(a)(1) of the INA, which provides that, with the exception of certain specifically delineated circumstances (none of which apply here):

> no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or place of residence.

8 U.S.C. § 1152(a)(1) (emphasis added). Enacted as part of the Immigration and Nationality Act Amendments of 1965, Pub. L. 89-236, § 1152(a)(1) "manifested Congressional recognition that the maturing attitudes of our nation made discrimination on [the enumerated] bases improper." *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980).

Before this Court, the Department contends that its policy does not discriminate on the basis of "nationality," and does not discriminate in the "issuance of immigrant visas." Reduced to its essence, the Department's position is that it is free to ignore an unambiguous congressional prohibition on the basis of vague and unsupported foreign policy "concerns."

A. The Department's Policy Discriminates Against Vietnamese Visa Applicants Because Of Their Nationality.

The Department requires Vietnamese residents of Hong Kong to return to Vietnam in order to apply for and obtain their immigrant visas, but allows Hong Kong residents of every other nationality to apply for and obtain immigrant visas in Hong Kong. If an Australian man who entered Hong Kong illegally is the beneficiary of an IV petition, he may simply walk into the U.S. Consulate in Hong Kong, which will process and issue his visa,

and be promptly reunified with his wife or children living in the United States. If, however, a Vietnamese man who entered Hong Kong illegally is the beneficiary of an IV petition, and walks into the Consulate in Hong Kong, he is turned away and told he must return to the county from which he fled. Reunification with his family will be substantially delayed, if not forever thwarted.

The D.C. Circuit correctly found, based on the Department's own statements, that this policy is discriminatory because it draws "an explicit distinction between Vietnamese nationals and nationals of other countries": the Department instructed the U.S. Consulate in Hong Kong not to process the "immigrant visa [applications] of *Vietnamese nationals* residing illegally in Hong Kong." Pet. at 9a, 12a; JA 112-13; JA 208-09. As the Department's operating manual makes clear, nationals of other countries who reside in Hong Kong can be processed and issued IVs, regardless of whether their status in Hong Kong is legal or illegal. Foreign Affairs Manual ("FAM") § 42.61, N.1.2 ("the fact that an alien does/did not have, or intend to have, the status of a lawful permanent resident or any other legal status" in the country of his principal, actual dwelling "is not relevant"), *reprinted in*, 10 Charles Gordon & Stanley Mailman, *IMMIGRATION LAW & PROCEDURE* (1996) (hereinafter cited as FAM § 42.61). Thus, in requiring that Vietnamese residents of Hong Kong establish the legality of their status (*i.e.*, that they are screened-in) to have their visas processed in Hong Kong, the Department's policy unquestionably "discriminate[s] against Vietnamese on the basis of their nationality." Pet. at 11a.

The Department asserts that its policy, which was formulated specifically to deal with Vietnamese boat people, is not discriminatory because the line it draws between Vietnamese nationals and other nationals is based upon the "screened-out" status, rather than the "illegal" status, of the Vietnamese nationals. The Department mischaracterizes its own policy. As the Department informed the HKG, its non-processing policy applies to any Vietnamese national who has not been screened-in, whether because they are "awaiting a screening decision" or have been "screened-out" as a non-refugee. JA 74-75; JA 78-79. The HKG treats all Vietnamese nationals in Hong Kong without proper travel documents as illegal aliens and detains them, unless they are

screened-in as political refugees. The Department's policy, therefore, applies to all Vietnamese nationals illegally in Hong Kong. JA 50-53; JA 69.

Moreover, even if one assumes, counterfactually, that the Department's characterization is correct, its policy nonetheless discriminates on the basis of nationality. As the Department acknowledges in its brief (at 46), its policy applies to Vietnamese nationals who are denied refugee status, but not to the nationals of other states who are denied such status. Thus, the Department's policy is discriminatory because it draws an explicit distinction between Vietnamese nationals denied refugee status, who are required to return to their country of origin for visa processing and issuance, and applicants of all other nationalities denied refugee status, who can have their visas processed in the country in which they reside.[5] Were such a policy applied to deny processing to blacks or women who had been denied refugee status, no one would question that such a policy was discriminatory on its face. The result can be no different where the basis for distinction lies in the applicant's nationality, rather than in his or her race or sex.

The Department also asserts that its policy is neutral as to nationality because it only applies to asylum-seekers who are screened-out under an international plan (*i.e.*, the CPA). According to the Department, its policy does not treat similarly situated nationals differently, but merely has a disparate impact on Vietnamese nationals because they happen to be the only nationals who are subject to the plan.[6] As the Department admits, however,

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[5] The Department asserts that the fact that it also requires screened-out Laotian nationals who reside in Thailand to return to Laos to apply for IVs somehow renders its policy with respect to Vietnamese residents of Hong Kong non-discriminatory. None of the evidence the Department cites for the proposition that its policy applies equally to Laotian nationals is part of the record in this case, and thus it should be disregarded. *See* Pet. 12a. Even if true, however, as the district court stated in a related case, the fact that the Department's policy might also apply to Laotian nationals proves nothing more than that "the Department of State maintains a policy that discriminates against asylum-seekers from not one, but two or three specific countries." *Vo Van Chau*, 891 F. Supp. at 655.

[6] Respondents acknowledge that § 1152(a)(1) was not intended to prohibit disparate impact discrimination. Accordingly, the Department's argument that it

the CPA itself is not neutral as to nationality, but rather is "tailored to address a very specific problem involving migration of nationals primarily of one country," Vietnam. Pet. Br. at 47. Whether or not the Department's description of its classification explicitly mentions Vietnamese nationals, the CPA—to which the Department's policy refers and upon which it is based—itself draws an explicit distinction between Vietnamese and persons of other nationalities. In any event, the Department's CPA-related justification for its policy is pretextual. The Department itself acknowledged in 1990, and the record before this Court demonstrates, that the CPA does not preclude the processing and issuance in Hong Kong of IVs for screened-out Vietnamese. JA 115-16; JA 72-73.

At bottom, the Department's position is that its policy of requiring Vietnamese nationals to return to their country of origin for visa processing is non-discriminatory, even though it draws a nationality-based distinction, because it was adopted to serve perceived foreign policy goals that apply only to Vietnamese. Thus, the Department says, no other nationalities are similarly situated. The critical flaw in the Department's argument is that it confuses a discriminatory classification with the purported justification for that classification.

In advancing a theory of discrimination that defines the existence of a classification by reference to its justification, the Department would have this Court reverse more than a half century of its equal protection jurisprudence dating at least as far back as the classic cases of *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). In each of those cases, the government argued that its policies imposing severe restrictions on persons of Japanese ancestry were justified by the need to prevent "espionage and sabotage, in time

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is impossible to "fashion a standard to determine" whether, for instance, a decision to operate fewer consulates in one country as opposed to another constitutes discrimination is beside the point. However ill-equipped the courts might be to make such a determination, they are surely competent to determine the legality of an agency policy that on its face discriminates against a statutorily protected class.

of war and of threatened invasion." *Hirabayashi*, 320 U.S. at 100. Although the Court ultimately upheld the policies at issue as justified by a compelling national interest, the Court nevertheless regarded the national origin classification as "inherently suspect" and thus subjected it to strict judicial scrutiny. *Korematsu*, 323 U.S. at 216. Under the Department's novel theory of discrimination, however, the restrictions imposed on natives of Japan should not have even presented a discrimination issue because natives of no other country were similarly situated—only Japan had invaded American soil.

The Department cannot be correct in theorizing that discrimination based upon nationality (or upon race) does not occur whenever there are relevant differences (e.g., coverage under an international plan) that separate nationals of one country (or members of one race) from nationals of other countries (or members of other races). Differences can always be identified between any two classes of individuals and, in certain instances, those differences may even justify differing treatment. In § 1152(a)(1) of the INA, however, Congress has ordained that with respect to the issuance of an IV, no distinctions may be drawn between groups of persons *because* of their race, nationality and sex—regardless of whether the group so classified differs from others in some additional identifiable manner. In other words, when it comes to the issuance of an IV "so far as the [Congress] is concerned, people of different races[, nationalities and gender] are always similarly situated." *M. v. Superior Court of Sonoma County*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring).

B. The Department's Policy Discriminates Against Vietnamese Visa Applicants In The Issuance of Immigrant Visas.

For the first time in its petition for rehearing to the court of appeals, the Department asserted that its policy does not discriminate in the "issuance" of a visa, but merely in the way in which the visa application is "processed."[7] The Department

[7] By not making this argument until its petition for rehearing, the Department has waived it. In fact, when it addressed respondents' § 1152(a)(1) claims in both courts below, the Department did not dispute that its policy

contends (at 41) that because § 1152(a)(1) uses the word "issuance," the statute only prohibits discrimination by a consular officer "when deciding whether to grant or deny [a specific] immigrant visa" and does not prohibit discrimination of any kind with respect to "other aspects of the visa application process."

The arbitrary line the Department seeks to draw between discrimination in the "decision" of a consular officer whether to grant or refuse a visa and discrimination at all other stages of the visa application process finds no support in the statutory text, structure or purpose. Nothing in the language of § 1152(a)(1) suggests that it was intended to limit only the authority of consular officers in deciding whether to grant or deny individual visas. Section 1152(a)(1) does not read that "no person shall be discriminated against by a consular officer in the decision whether to grant or refuse an immigrant visa." Rather, § 1152(a)(1) is a general prohibition, which provides that "[n]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality," whether the source of such discrimination is an individual consular officer, the Secretary of State or the Attorney General.

Had Congress intended to limit § 1152(a)(1)'s prohibition on discrimination only to the penultimate aspect of the visa issuance process, *i.e.*, the substantive decision of a consular officer whether to grant or deny a specific visa, it certainly knew how to do so. For example, in delineating the powers and duties of the Secretary of State with respect to the immigration and nationality laws in § 1104(a) of the Act, the Congress specifically excluded "those powers, duties and functions relating to *the granting or refusal of visas*." The fact that the Congress did not use similar language in § 1152(a)(1) of the Act is a powerful indication that it did not

constituted discrimination on the basis of nationality in the "issuance of an immigrant visa." Moreover, because the Department did not come up with the "issuance" argument until so late in the day neither the district court nor the court of appeals had the opportunity to consider it. As a prudential matter, this Court should not be the first court in the country to do so.

intend to limit the prohibition on discrimination to the consular officer's substantive decision whether to grant or refuse a visa.[8]

Similarly, there is no etymological basis for the Department's definition of the word "issuance" that would restrict its meaning to the consular officer's "decision." The dictionary cited by the Department defines "issuance" to mean "officially putting forth . . . or making available or distributing or giving out or granting (as licenses) or proclaiming or promulgating (as a written order or directive)." Pet. Br. at 43 n.32. As this dictionary definition makes clear, the meaning of the word "issuance" is not "the decision" whether to grant or deny a license, but is (and at a minimum includes) the actual putting forth or giving out of the license. *See, e.g., Florida Manufactured Housing Ass'n v. Cisneros*, 53 F.3d 1565, 1574 (11th Cir. 1995) (agency attempt to redefine the word "issued" to mean "the act of arriving at a private decision within the agency," rather than the actual announcement of the decision, "contravenes the plain meaning of the term"). Even the Department recognizes (at 41) that when Congress prohibited discrimination in the issuance of an immigrant visa, it could not possibly have intended to permit discrimination in all aspects of the visa application process prior to the point at which a consular officer actually furnishes the visa document to the applicant. There is no basis in the definition to conclude, as the Department does, that Congress intended to permit race and nationality discrimination at every stage of the visa issuance process except the penultimate stage at which a consular officer "privately" decides whether to grant or deny a visa.[9]

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[8] The Department's interpretation of "issuance" to mean the decision whether to grant or refuse also cannot be reconciled with the fact that in addition to prohibiting discrimination, § 1152(a)(1) provides that "[n]o person shall receive any . . . priority . . . in the issuance of an immigrant visa" on any of the specified grounds. The use of the word "priority" strongly suggests that § 1152(a)(1) is concerned not merely with the substantive decisions affecting visa issuance, but also with the *timing* of such issuance—a matter that is inextricably related to place of processing.

[9] The use of the word "issuance" in numerous other sections of the INA confirms the word's meaning as the actual "putting forth" or "giving out" of a visa, order, permit or other official document, rather than a Department official's private decision prior to the "issuance." *See, e.g.*, 8 U.S.C. §§ 1105(a)(1), 1105a(a)(8), 1153(g), 1203(b), 1203(c), 1227(a)(1), 1322(a), 1421(b)(4).

Ultimately, however, parsing all the various phrases in the rather extensive dictionary definition of the word "issuance" is beside the point. In trying to focus the discussion on the meaning of the word "issuance," the Department seeks to obscure the basic fact that § 1152(a)(1) bars the Department from *discriminating* against certain protected classes of individuals in the issuance of immigrant visas.[10] When Congress prohibited all discrimination in the issuance of an immigrant visa, it necessarily prohibited the Department from imposing onerous procedural requirements on the issuance of an immigrant visa, which make the procurement of such visas impossible or significantly more difficult for members of a particular race or nationality.[11] There can be no doubt that a policy that requires undocumented black, female or Vietnamese residents of Hong Kong to travel to Timbuktu before they can apply for and be issued immigrant visas—while allowing all other undocumented residents of Hong Kong to apply for and be issued immigrant visas at the U.S. Consulate in Hong Kong—constitutes "discrimination" in the issuance of an immigrant visa on account of race, sex or nationality. Whether the word "issuance" is defined as "putting forth," "making available," "distributing," "giving out" or "granting," the Department's policy of requiring

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[10] A leading dictionary defines "discrimination" to mean "the according of differential treatment to persons of an alien race or religion (as by formal or informal restrictions imposed in regard to housing, employment or use of public common facilities)." *Webster's Third New International Dictionary* 648 (def. 4(a)) (1971). Applying this common usage definition of discrimination to § 1152(a)(1), that Section prohibits "the according of differential treatment to persons of [a particular] race or [nationality] (as by formal or informal restrictions imposed in regard to [the issuance of an immigrant visa])."

[11] *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Fifteenth Amendment "hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race"). The Department's unsupported assertion that its policy has no "discriminatory effect on the 'issuance of immigrant visas'" is simply wrong. As the record in this case makes clear, forcing a Vietnamese national to make his application in Vietnam will delay the issuance of the visa by at least a year and may even result in its denial. JA 137-38; JA 143-46; JA 157; *Vo Van Chau*, 891 F. Supp. at 656.

Vietnamese nationals to return to Vietnam to have their visas processed and issued violates § 1152(a)(1).

The INA itself recognizes that the "issuance" of visas cannot be separated from the procedures under which visa applications are processed. Section 1201 of the Act, entitled "Issuance of visas," for example, provides that a visa shall not be "issued" to an alien if the "application fails to comply with the provisions of this chapter [the INA], or the regulations promulgated thereunder." 8 U.S.C. § 1201(g). This provision—as well as § 1202(a) relating to place of processing, on which the Department places great reliance in its Brief (at 16-17, 36-39)—is included under a subchapter entitled "*Issuance* of Entry Documents" (emphasis added). *See also* H.R. Rep. No. 1365, 82d Cong., 2d Sess. 53 (1952) ("Sections 221, 222, and 223 provide for the issuance of entry documents . . . [including] both immigrant and nonimmigrant visas."). Clearly, Congress understood that the "issuance" of a visa is the result of, and cannot be separated from, the process by which the visa is obtained.[12]

It is this Court's "task . . . to interpret the words of [this] statute[] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). The principal purpose of the 1965 Amendments to the INA was to repeal the discriminatory national origins quota system and to ensure that "henceforth there will be no differentiation in the treatment of the Asian" under the INA. S. Rep. No. 748, 89th Cong., 1st Sess. 10, 15 (1965). In eliminating discrimination from the system, Congress specifically "anticipated that all individuals

[12] The Department asserts (at 45) that the court of appeals erred in failing to defer, under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to its "reasonable construction" of the term "issuance." The Department is disingenuous in faulting the court of appeals for failing to defer to an interpretation that was asserted for the first time in its petition for rehearing. The Department's litigation position, a *post hoc* rationalization by appellate counsel, is entitled to no deference. *See, e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991). Moreover, there is nothing ambiguous about the language of § 1152(a)(1). And even if there were, the Department cannot contend its interpretation of the word "issuance" is reasonable where its arguments about the meaning of the statute are inconsistent with each other. *See* pp. 23-24, *infra*.

from each foreign state will be able to participate equally and fairly in the numbers . . . made available for immigration." H.R. Rep. No. 745, 89th Cong., 1st Sess. 13 (1965). The distinction the Department asks this Court to draw between processing and issuance is an artificial one that would undermine the congressional purpose in barring nationality and race discrimination in the issuance of immigrant visas, because a visa cannot be issued to anyone who has not gone through the process.[13]

The Department's interpretation of § 1152(a)(1) would render the provision meaningless. As the Department takes much pain to point out, decisions by consular officers to grant or deny visas to specific individuals historically have been immune from judicial review even at the request of U.S. citizens under the doctrine of "consular non-reviewability." Pet. Br. at 16-17, 36-39. Such decisions are not even reviewable by the Secretary. 8 U.S.C. § 1104(a). If the Department's interpretation is correct, § 1152(a)(1) would be entirely precatory—it would not apply to any action by State Department or INS officials other than the final decisions of consular officers, and discrimination by consular officers in decisions to grant or deny visas would not be remediable as a result of § 1104(a) and the consular nonreviewability doctrine. Such an interpretation would certainly defy "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *accord Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 562 (1987).

The Department's argument ignores logic and common sense. Under the Department's interpretation, the Secretary of State would be free to suspend indefinitely all processing of IVs for a

[13] The fact that the Department was able to slip into the immigration bill, currently pending before a House-Senate Conference Committee, an amendment that would reverse the court of appeals' interpretation of § 1152(a)(1) says nothing about Congress' intent when it enacted that section in 1965. Nor does it say anything about Congress' current view. Having "recently become aware" of this "obscure" provision, 45 congressmen, including 13 members of the House Judiciary Committee, sent a letter to the President on August 1, 1996 (lodged with the Clerk of this Court), expressing their view that the court of appeals' interpretation of § 1152(a)(1) was correct and asking the Administration to withdraw its support for the proposed amendment.

group of aliens purely on the basis of race or nationality, since that suspension would not involve individual consular officers' decisions whether to grant or deny a particular visa application. Similarly, under the Department's view, the statute would not bar INS officials from adopting a policy of refusing to process family reunification immigration petitions for Asians or Africans, while processing them for Europeans. It is inconceivable that this was the intent of Congress when it enacted 8 U.S.C. § 1152(a)(1).

C. The INA Does Not Exempt Consular Venue Policies From The Anti-Discrimination Mandate In § 1152(a)(1).

No provision in the INA exempts "consular venue" policies from the requirement of § 1152(a)(1). Contrary to the Department's argument, the absence of a separate provision precluding discrimination on the basis of race and nationality in § 1202(a)—which provides that aliens applying for an immigrant visa shall do so "in such form and manner and at such place as shall by regulations be prescribed"—lends no support to its position. Having imposed a general prohibition prohibiting discrimination in the issuance of an immigrant visa in § 1152(a)(1), Congress could not have been expected to include a separate non-discrimination provision in each individual section of the INA that addresses some specific aspect of the visa issuance process.

To the contrary, had Congress intended to limit the reach of § 1152(a)(1) to the specific visa decisions of consular officers, it should, by the Department's logic, have placed that non-discrimination provision in § 1201 of the Act which addresses the authority (and the limitations on the authority) of consular officers to issue an IV. If anything, Congress' placement of the provision in a section of the Act that has nothing to do with the authority of consular officers is further evidence that the non-discrimination provision is not directed purely at the decisions of consular officers.

The Department also contends (at 43) that had Congress intended § 1152(a)(1) to be a general bar against race, sex and nationality discrimination, it would have placed such a bar "as a general provision of the INA." The Department, however, does

not state in which "general provision" of the INA one might expect Congress to have placed the discrimination prohibition. This is not surprising. The INA does not contain any such general provisions.

The fact that Congress placed the non-discrimination provision in the section governing numerical limitations on the admission of immigrants from individual states should also come as no surprise, since it is in that section that Congress replaced the discriminatory national origins quota system with "a new system for issuance of immigrant visas without regard to national origin." S. Rep. No. 748 at 21. It makes perfect sense that Congress would include in the same section that created this neutral system, a provision prohibiting discrimination in the issuance of IVs on the basis of race, sex, nationality and national origin.

Despite the logic of including § 1152(a)(1) in the "section of the INA that addresses numerical limitations" on admission, the Department argues (at 43-44) that this placement establishes that the prohibition on discrimination applies only to "the allocation of immigrant visas." This argument is entirely inconsistent with the plain language of § 1152(a)(1), which prohibits discrimination in the "issuance of an immigrant visa," not in the "allocation of immigrant visas." Furthermore, the Department's tortured construction would render the prohibition on discrimination in § 1152(a)(1) superfluous. The system established by Congress in the 1965 Amendments leaves neither the Secretary nor individual consular officers with any discretion over the allocation of IVs. Rather, "subject to specified limitations designed to prevent an unreasonable allocation of visa numbers to any one foreign state," the Act requires that the Secretary make IVs available "on a first-come, first-served principle, without regard to place of birth." S. Rep. No. 748 at 14; *see* 8 U.S.C. § 1153(e)(1) ("[i]mmigrant visas . . . shall be issued to eligible immigrants in the order in which a petition on behalf of each immigrant is filed"). Congress thus left no room for the Secretary or consular officers to make any determinations in respect of the allocation of IVs, much less any room to discriminate in such allocation on the basis of race, nationality or sex. Accordingly, to interpret 8 U.S.C. § 1152(a)(1) as barring discrimination only in respect to the allocation of IVs is to read that anti-discrimination provision out of the INA. It is,

however, a fundamental rule of statutory construction that statutes be construed, if possible, to give all of their provisions meaning and "operative effect." *United States v. Nordic Village*, 503 U.S. 30, 36 (1992).

The Department's position that § 1152(a)(1) applies only to the allocation of visas is completely at odds with its other statutory argument: that § 1152(a)(1) applies only to the decisions of consular officers. If "issuance" means only the decisions of consular officers, it cannot be that § 1152(a)(1) goes only to IV allocations because consular officers make no decisions regarding allocation. For the same reason, if § 1152(a)(1) goes only to IV allocations, "issuance" cannot mean the decisions, of a consular officer. Obviously, the Department is straining mightily to overcome the plain language of the statute.

The Department falls back on the assertion (at 42) that a "construction of Section 1152(a)(1) as extending to consular venue determinations . . . would be unworkable" because that section precludes discrimination on the basis of an alien's place of residence and the State Department has historically required "aliens to apply for visas in their place of residence." Such a requirement, however, does not discriminate against aliens on the basis of their residence anymore than would a requirement that all aliens apply for visas in their country of origin discriminates against aliens on the basis of their nationality. In both instances, the consular venue requirement applies across the board to all aliens, regardless of their country of residence or their nationality.[14] A requirement directing that an alien apply for a visa in his country of residence or nationality would be discriminatory only if it were restricted to aliens who reside in a particular place or are nationals of a particular country—precisely the situation in this case.

Unable to support its argument by reference to the statutory text, structure or purpose, the Department resorts to a policy appeal, warning that if its interpretation is rejected, the United

[14] For the same reason, the Department's requirement that all aliens who are nationals of a country in which no consular office is located apply for an IV in another country is also non-discriminatory. *See* note 31 *infra*.

States will be deprived of "an effective tool in deterring mass migration." Pet. Br. at 48. Other than this case, however, the Department can cite no instance in which it has ever needed to use this "tool." This is not surprising because IV beneficiaries are only likely to take part in a "mass migration" in the rare instance when their government interferes with their ability to obtain an IV at a U.S. consulate located where they reside. Even when this occurs, the Department's assertion that it will lose an "effective tool" is still incredible because the number of U.S. IV beneficiaries will inevitably be just a tiny fraction of any mass migration.

The Department protests that "[n]ationality distinctions have long played a significant and legitimate role in the application of our immigration laws." As Congress recognized when it passed the 1965 Amendments to the INA, however, it is also the case that distinctions based on "race and place of birth" have played a significant and shameful role in the "selection of immigrants" under our immigration law. H.R. Rep. No. 745 at 10. Whatever role such distinctions may have played in the past, in enacting § 1152(a)(1), Congress placed classifications based on nationality on the same footing as classifications based on race, gender and country of birth and prohibited the Secretary from discriminating on all such grounds in the issuance of immigrant visas.

II. THE STATE DEPARTMENT'S POLICY VIOLATES MR. VO'S CONSTITUTIONAL RIGHT TO NON-DISCRIMINATORY TREATMENT.

Both in enacting the INA in 1952 and in amending it in 1965, "Congress extended to American citizens the right to choose to be reunited in the United States with their immediate families." *Fiallo v. Bell*, 430 U.S. 787, 806 (1977) (Marshall, J., dissenting). Under the system established by Congress, every American citizen has "the right to bring his alien spouse[,] . . . his alien minor child [and, in the case of an American citizen over the age of 21, his parents] as nonquota immigrant[s]." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952); *see* 8 U.S.C. § 1151(b). An American citizen also has the right to bring his adult children and siblings as quota immigrants. 8 U.S.C. § 1153. Each of these provisions "implement[] the underlying intention of our immigration laws

regarding the preservation of the family unit." H.R. Rep. No. 1365 at 29; *accord* S. Rep. No. 748 at 12.

Though classifications based on race, sex, and nationality once characterized our immigration laws, Congress eliminated race and sex as a bar to immigration when it passed the 1952 Act (H.R. Rep. No. 1365 at 28) and, as we have seen, eliminated nationality as a bar when it passed the 1965 Act. Expressing its indignation with a system that had unjustly separated thousands of American citizens from their families, Congress removed these discriminatory barriers to ensure that "American citizens be accorded equal consideration in bringing their loved ones here." 111 Cong. Rec. 21,767 (1965) (remarks of Mr. Minish).[15]

The Department's discriminatory implementation of this congressionally mandated family reunification program violates the constitutional right of American citizens to equal protection. We do not contest the settled principle that "an alien seeking initial admission to the United States . . . has no constitutional right[]" to immigrate to this country. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). This case, however, "unlike most immigration cases that come before the Court, directly involves the rights of citizens, not aliens." *Fiallo*, 430 U.S. at 806 (Marshall, J. dissenting). Where, as here, Congress establishes a program, "fair on its face and impartial in appearance," that confers a right upon the citizenry of this country, agency officials are without authority to apply that program with "an unequal hand" against a traditionally suspect group. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).[16] When agency officials exceed this authority, they deny to the members of the group so targeted the right to equal protection of the laws and violate the Fifth Amendment.

[15] *See also* 111 Cong. Rec. 21,759 (1965) (the bill "will destroy such discrimination" that denies Americans "the right to be with their loved ones") (remarks of Rep. Barrett); *id.* at 21,594 (Because of "its discrimination and inflexibility" the national origins quota system is "an injustice to thousands of citizens and residents separated from their loved ones") (remarks of Rep. Rodino); *id.* at 21,788 (the bill will "bring our immigration law . . . into compatibility with the philosophy that has made and that is America—equal opportunity for all U.S. citizens.") (remarks of Rep. Sickles); *id.* at 21,765-66 ("purpose" of bill is to "correct the injustices suffered by thousands of our citizens" who have been separated from "loved ones who have been left in foreign lands") (remarks of Rep. Adams).

A. The Department's Policy Discriminates Against A Class Of American Citizens On A Constitutionally Suspect Basis.

This Court has long regarded "classifications based on . . . nationality," like those based on race, as "inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *accord Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995); *Korematsu*, 323 U.S. at 216; *Hirabayashi*, 320 U.S. at 100. In singling out Vietnamese visa beneficiaries for discriminatory treatment, the Department's policy necessarily discriminates against their American citizen sponsors, who will almost invariably have the same national origin as the family member on behalf of whom he or she has filed an IV petition. In the context of a family reunification program, therefore, discrimination against non-resident aliens on the basis of national origin necessarily constitutes discrimination against sponsoring American citizens on the basis of their own national origin.

Of equal importance, this Court has long recognized that classifications that distinguish among American citizens on the basis of the race or national origin of their family members are themselves constitutionally suspect. In *Oyama v. California*, 332 U.S. 633 (1948), for instance, this Court subjected to heightened judicial scrutiny a law that restricted the ability of Japanese aliens to convey property to their American children because it discriminated against the children "based solely on [their] parents' country of origin"—"as between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination." *Id.* at 640, 645. Similarly, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court held that the Equal

[16] The Department incorrectly asserts (at 32) that "no claim of a violation of the constitutional rights of United States citizens was before the court of appeals. In fact, respondents extensively briefed their constitutional challenge in the court of appeals and in the district court. *See* Appellants' Brief at 34-37; Appellants' Reply Brief at 8-10; Plaintiffs' Summary Judgment Mem. at 23-27.

Protection Clause required that the "the most exacting scrutiny" be applied to a classification that denied custody to the parent of a child based on the race of his or her spouse. *Id.* at 432; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) ("decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination").

The application of heightened scrutiny is particularly appropriate in this case in view of the fact that the statutory right with which the Department's discriminatory policy interferes—the right to family unity—is itself a central part of "the liberty protected by the Due Process Clause." *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639 (1974). This Court has recognized that "the right to rejoin [one's] immediate family [is] a right that ranks high among the interests of the individual." *Landon*, 459 U.S. at 34; *accord Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). In noting that the interest in family reunification is one of constitutional dimension, we do not mean to suggest that Congress is not free to make whatever policy choices it deems appropriate in determining the criteria for admission of aliens. Where, however, Congress has enacted a statute to enable American citizens to realize the enjoyment of a fundamental right, this Court should closely scrutinize the policies of public officials who seek to restrict it. And where, as here, those policies not only restrict such rights but do so in a manner that discriminates against a suspect class, they should be deemed "presumptively invalid" and upheld only upon the showing of the most "extraordinary justification." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

B. Absent A Specific Delegation Of Congressional Authority, State Department Officials May Not Discriminate Against American Citizens In Immigration Matters On Constitutionally Suspect Grounds.

Were the statutory rights at issue in this case to touch upon any matter other than immigration, there would be no doubt that the administration of those rights in a manner that discriminates on the basis of race, gender or national origin would be subject to the most exacting judicial scrutiny. The critical issue in this case, therefore, is whether, in the absence of a specific delegation of

congressional authority, State Department officials have the constitutional authority to make classifications based upon race, gender and national origin in matters concerning immigration that would be plainly unconstitutional if made in any other context. We submit that the answer is no.

1. The authority to discriminate against American citizens in matters of immigration lies solely with Congress.

Respondents do not challenge any congressional policy choice concerning which classes of aliens may be admitted to this country and the conditions under which they may gain such admission. Rather, respondents challenge a policy choice made by State Department officials to discriminate against a class of U.S. citizens on the grounds of their own national origin and that of their family members, in contravention of an expressed congressional intention to remove all barriers to admission based on that ground.

This distinction between congressional and administrative action is critical. This Court has long recognized the authority of "*Congress* [to] make[] rules [for aliens] that would be unacceptable if applied to citizens," *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). While the Department spills much ink in its effort to characterize the power over the admission of aliens as belonging equally to the Executive and the Legislative branches, it cites no case in support of that proposition. That is because the Department's proposition is wrong. The principle that:

> the formulation of [immigration] policies is *entrusted exclusively to Congress* [is] as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.

Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added); *accord Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) ("[t]he Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens'"); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is *the legislative power of Congress* more complete than it is over" the admission of aliens) (emphasis added).

Far from having co-equal power over immigration matters, the authority of the Executive in this area is subservient to that of Congress. It is the "responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). In carrying out its role "[i]n the enforcement of [congressional] policies, the Executive Branch of the Government must respect the procedural safeguards" fixed by Congress. *Galvan*, 347 U.S. at 531; *accord Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (R. B. Ginsburg, J.) (Executive discretion in area of immigration "extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations."), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

From these principles, it follows *a fortiori* that any authority to make classifications in respect of the admission of aliens that would be constitutionally suspect if made outside the realm of immigration lies solely in Congress. This Court recognized as much just three months before the enactment of the INA in 1952:

> the conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether [and] the basis for determining such classification ... have been recognized as matters *solely for the responsibility of the Congress*.

Harisiades v. Shaughnessy, 342 U.S. 580, 596-97 (1952) (emphasis added); *Boutilier v. I.N.S.*, 387 U.S. 118, 123 (1967) (same). Had Congress made the classification that has been drawn in this case, that classification would not be subject to strict judicial scrutiny for the sole reason that Congress has plenary authority in the admission of aliens. Unlike Congress, however, the Secretary of State—much less the lower officials in the Department who promulgated this policy[17]—may not invoke the mantle of plenary power as a means of shielding his discriminatory conduct from such scrutiny. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985).

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[17] The only indication in the record of the level at which the policy was promulgated comes from an October 1994 cable reinstituting the April 1993 policy, in which the highest official listed is Michael Hancock, Managing Director of the Department's Visa Office. JA 217.

This principle is confirmed by this Court's decision in *Fiallo v. Bell*. Citing the "exceptionally broad power" of Congress "to determine which classes of aliens may lawfully enter the country," the Court held that a provision of the immigration law that denied fathers of illegitimate children and children of illegitimate fathers preferential immigration status was not subject to heightened scrutiny under the Constitution. 430 U.S. at 794. In dissent, Justice Marshall argued that having extended certain rights of family reunification to American citizens, Congress could not, in the absence of an important government interest, "deny those rights to a class of citizens traditionally subject to discrimination." 430 U.S. at 808. Addressing Justice Marshall's argument, the majority agreed that it "would be persuasive if [the dissent's] basic premise," that "the Act grant[s] a 'fundamental right' to American citizens," were accepted. 430 U.S. at 795 n.6. In that case, however, the dissent's premise was wrong, because while Congress had granted a fundamental right to most U.S. citizens, it had made a "policy choice" to deny that right to illegitimate children and their fathers. *Id.* at 795.

In contrast, this case involves a policy choice not by Congress in the exercise of its plenary immigration power, but by State Department officials to discriminate against American citizens in respect of a fundamental right—the right to reunite with their immediate family—that Congress has specifically conferred on them. Thus, this case involves precisely the situation in which the *Fiallo* majority agreed that Justice Marshall's dissent would have been persuasive.

2. Congress has not delegated to State Department officials the authority to discriminate in the administration of the family reunification program.

Absent a specific delegation of congressional authority or the presence of a compelling state interest, State Department officials cannot discriminate against a traditionally suspect class of American citizens in their enjoyment of this statutory right without violating the Fifth Amendment. Congress has made no such delegation.

Both this Court and the Attorney General have acknowledged that when a provision of the INA vesting discretion in agency

officials is neutral on its face, such a provision cannot be interpreted as authorizing discrimination on grounds of nationality. In *Jean v. Nelson*, a class of Haitian nationals brought suit challenging the authority of INS officials to discriminate against them on the basis of their national origin in making parole decisions under 8 U.S.C. § 1182(d)(5)(A). While characterizing the grant of discretion under that provision as "exceedingly broad," the Attorney General conceded—and this Court ruled—that "the INS's parole discretion under the statute and regulations does not extend to considerations of race or national origin." 472 U.S. at 855.

If Congress did not grant INS officials authority to base parole decisions on considerations of national origin when it drafted the broad discretionary language contained in the parole statute, it simply cannot be that Congress granted State Department officials authority to discriminate on the basis of national origin in the administration of the INA's family reunification program. That family reunification program, unlike the parole program, grants American citizens a statutory right to reunite with their immediate relatives in this country without regard to race, nationality or gender. The proposition that such a delegation exists is further refuted by the anti-discrimination prohibition in § 1152(a)(1).

Where, as here, an intent to delegate specific authority is not clear from the plain language of the statute, this Court has demonstrated a profound "hesita[nce] to impute" a congressional purpose to authorize agency action that could not withstand constitutional scrutiny absent the congressional delegation. *Kent v. Dulles*, 357 U.S. 116, 128 (1958). In *Kent* the Court considered whether the Secretary of State had acted within his authority under the INA in denying a passport to an American citizen on the basis of his affiliation with the Communist Party. Like the "consular venue" provision at issue here, the provision imbuing the Secretary with power over the issuance of passports in *Kent* was "expressed in broad terms." *Id.* at 127. Nonetheless, the Court held that absent a specific provision restricting the issuance of a passport on account of a person's beliefs or associations, the Secretary had no authority to "employ that standard to restrict the citizens' right of free movement." *Id.* at 130. The Court was guided by the principle that where "an exercise by an American

citizen of an activity included in constitutional protection" is involved, it will "construe narrowly all delegated powers" and will "not readily infer that Congress gave the Secretary of State unbridled discretion" to act as he pleases. *Id.; see also United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210, 219 (1949).

As in *Kent*, this case involves a right entitled to Fifth Amendment protection—the right to participate on an equal basis in a congressionally mandated family reunification program. The Department asserts that § 1202(a), a grant of rulemaking authority expressed in broad terms, was enacted to give the Department limitless and unreviewable discretion to make consular venue decisions for its own benefit.[18] *Kent* teaches, however, that the "key to the problem . . . is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he has discretion." 357 U.S. at 125. In *Kent*, the Court emphasized that "while the power of the Secretary . . . is expressed in broad terms, it was apparently long exercised quite narrowly." *Id.* at 127. In this case, at the time the INA was enacted in 1952, the Department's regulations, consistent with its longstanding practice, provided for IV processing in the consular office located "in the district of a foreign country in which the alien has his domicile," but gave an applicant the option to apply for a visa outside his country of residence if certain specifically enumerated criteria were met. 59 Fed. Reg. 39,953 (1994) (quoting pre-1952 regulation).

The legislative history of § 1202(a) reveals that Congress expected the Secretary to enact a more "flexible requirement" patterned after the "[e]xisting regulations," so as to effectuate Congress' principal purpose to address the needs of displaced persons who "have been uprooted and dislocated":

> The amendment is designed to alleviate hardship which might be caused by a rigid requirement that visa applications "shall be filed only with a consular officer in whose district the applicant shall have established residence."

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[18] The Department's citation to a statement in the federal register to support this assertion is disingenuous. The Department drafted the self-serving language it cites when it amended 22 C.F.R. § 42.61 in specific response to this lawsuit.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 54 (1952). Consistent with congressional intent, the Department promulgated new regulations in 1952 requiring consular officers to process an alien's IV application in the consular district in which the alien resided, but also giving a consular officer "discretionary authority to accept an application from an alien . . . physically present" in the consular district. 17 Fed. Reg. 11,587 (1952).[19] Section 1202(a) embodies this principle of providing flexibility for the benefit of aliens as a limitation on the Secretary's consular venue discretion. *See Kent*, 357 U.S. at 125, 127.

Neither the legislative history nor the Department's practice preceding the enactment of the 1952 or the 1965 Acts suggests a congressional purpose to delegate to the Department the authority to discriminate against American citizens on the basis of race, sex or nationality in the administration of the INA's family reunification program. To the contrary, when the Department proposed in connection with the 1965 amendments to the INA that Congress give the Secretary certain authority to discriminate on the basis of nationality, Congress adamantly rejected any such delegation. The remarks of Representative Moore typified the congressional reaction to this proposal:

> The original administration bill provided for a wide grant of discretionary control over our immigration system. Under that proposal the executive could have used up to one-half of the quota numbers at his discretion. In the name of national security or diplomatic policy, the admission of aliens could have been subject to all sorts of political pressures internally and externally so far as this Nation's immigration policy is concerned. But this proposal was rejected. Your committee

[19] In 1966, the Department amended this regulation to provide that a "consular officer *shall accept* an application for an immigrant visa . . . if the alien is physically present" in the consular district. 31 Fed. Reg. 13,083 (1966) (emphasis added). The regulation was later amended to give a consular officer discretion to process the application of an alien even if he was not physically present in the consular district and remained in substantially the same form, *see* 22 C.F.R. § 42.61 (1993), until 1994 when it was amended in response to this litigation to give the Department discretion to require an alien to submit his application in any place of the Department's choosing.

> preserved for Congress . . . its historic responsibility and its constitutional prerogative.

111 Cong. Rec. 21,592 (1965).[20]

When Congress considers it necessary to give the Executive authority to draw distinctions among classes of aliens, it knows how to and does so explicitly. For example, Congress has granted such authority to the President, in certain limited circumstances. *See* 8 U.S.C. § 1182(f) (delegating to the President alone authority to issue "a proclamation" suspending entry of "any class of aliens" when he finds entry of that class "would be detrimental to the interests of the United States"). Consistent with this congressional purpose, the President has used this authority sparingly, and only in extraordinary circumstances and national emergencies. Other administration officials have no similar authority, except by express subdelegation by the President in his proclamation. *See, e.g., Allende v. Shultz*, 845 F.2d 1111, 1118-19 (1st. Cir. 1988); *Abourezk*, 785 F.2d at 1049; *Jean v. Nelson*, 727 F.2d 957, 966 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

In *Kent v. Dulles*, the Court struck down the Department's passport policy as *ultra vires* without reaching the question of constitutionality. 357 U.S. at 116. Similarly, this Court may hold that Department officials acted without statutory authority in adopting their discriminatory policy. Alternatively, should this Court reach the constitutional question, it is clear that because the Department in this case may not invoke the principle of plenary congressional power over immigration to insulate itself from heightened scrutiny, the Department must establish that its discriminatory policy is narrowly tailored to further a compelling governmental interest.[21] The Department has never asserted any

[20] *See also* 111 Cong. Rec. 21,759 (1965) ("This bill . . . vigorously rejects the proposed delegation of congressional authority to the executive for establishing policy to govern the admission of immigrants into the United States.") (remarks of Rep. Feighan); *id.* at 21,759 (similar remarks of Rep. McCulloch); *id.* at 21,771(similar remarks of Rep. Poff).

[21] *See e.g., American Baptist Churches v. Meese*, 712 F. Supp. 756, 773 (N.D. Cal. 1989) ("The Executive's allegedly chronic failure to abide by its Congressional mandate [not to consider nationality when applying the asylum laws] could constitute a denial of equal protection of the laws."); *Haitian Refugee*

justification for its conduct that could survive such searching judicial scrutiny, and certainly nothing in the record provides any support for that proposition.

III. THE STATE DEPARTMENT'S POLICY IS ARBITRARY AND CAPRICIOUS.

For the 14 years preceding its shift in policy in April 1993, the Department processed the current IV applications of Vietnamese beneficiaries in Hong Kong without incident. The Department continued to process such applications after the adoption of the CPA in 1989, without regard to whether or not the IV beneficiary had been "screened-in." Such processing in Hong Kong was required by the Department's then current regulations and was fully consistent with what the Department itself has described as its "historical" practice of processing IV applications in the consular district in which the applicant resides. *See* pp. 33-34 & n.19, *supra* and p. 49 & n.31, *infra*; Pet. Br. at 24, 42.

Prior to this litigation, the only public explanation the Department ever gave for the April 1993 change in its policy was in its letter to respondents informing them that "[u]nder the CPA, those not recognized as refugees . . . must return to Vietnam to resettle in a third country." JA 64-65. In a December 1990 cable to the U.S. Consulate in Hong Kong, however, the Department took the opposite view of the CPA, explaining that requiring a screened-out IV beneficiary to return to Vietnam to pursue resettlement is:

> *not at all necessary to preserve the integrity of the CPA* . . . . Post maintains . . . that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined to be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as Post reports . . ., *all major resettlement countries have made similar requests to release detainees for immigration*.

JA 115-16 (emphasis added); *see also* JA 72-73.[22]

When it reversed its position in April 1993, the Department provided no explanation of why its earlier interpretation of the CPA was incorrect, or why it changed its view. It gave no notice to IV applicants about its new policy until many months later, and in the meantime simply stopped processing their visas. It changed its policy knowing that the new policy would severely prejudice IV applicants, who would face continued hardship whether they remained in detention or returned to Vietnam, as well as their American sponsors, who would remain separated from their families. This kind of sudden and unexplained departure from an agency's long-standing practice, undertaken secretly and implemented through delay and inaction, cannot survive under the APA. *Atchison, T. & S. F. R. Co. V. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

During the course of this litigation, the Department has also defended its new policy on the ground that its previous practice had the effect of discouraging voluntary repatriation by detainees who had been screened-out. This "*post hoc* rationalization" for the Department's shift in practice is entitled to no weight. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). Moreover, this purported justification finds no support in the record. The number of beneficiaries is only a minute percentage of the total number of boat people detained in Hong Kong, the vast majority of which have no possibility of obtaining immigrant status. JA 116-17. It defies common sense to suggest that asylum seekers, who after years of detention are fully aware that they do not meet U.S. immigration criteria, are influenced in their decision to remain in squalid detention centers by IV processing of the relatively few who do. JA 135; JA 151-52.. Experience has shown that that decision is "driven by much more significant factors such

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Center, 503 F. Supp. at 532 (holding that INS program that discriminated against Haitian asylum-seekers on basis of nationality was not in conformity with statutes passed by Congress and, hence, was "offensive to every notion of constitutional due process and equal protection").

[22] In view of the fact that all other major resettlement countries have also performed IV processing in Hong Kong with the acquiescence of the HKG, the Department's self-serving and *post hoc* assertion that its policy shift was taken in response to objections from other countries is also not credible.

as the conditions of confinement, the prospects of being screened-in as a refugee, and the [boat people's] perception of what their situation would be like if they returned to Vietnam." JA 135; JA 152.[23]

IV. THE DEPARTMENT'S UNLAWFUL POLICY IS NOT IMMUNE FROM JUDICIAL REVIEW.

The Department concedes, as it must, that the federal courts may entertain challenges to the Department's immigration policies based on the violations of the constitutional rights of U.S. citizens. Pet. Br. at 32. *See, e.g., Fiallo*, 430 U.S. 787; *Kleindienst*, 408 U.S. 753. Thus, there is no question that the Court may consider Mr. Vo's equal protection claim.

The only issue is whether the Court may consider respondents' claims that the Department's policy violates § 1152(a)(1) of the INA and is arbitrary and capricious. The Department claims that this Court may not because the INA "impliedly precludes" APA review. This is not the first time the Government has raised the issue in this Court. In *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), the Government made the exact argument it advances here in virtually the same language in order to evade review of the Attorney General's policy of intercepting Haitian refugees at sea and forcibly repatriating them to Haiti. This Court proceeded to review the merits of this policy without honoring the reviewability argument with so much as a footnote.

The Department also argues that this Court cannot review its unlawful policy because it is "committed to agency discretion by law." This assertion is also erroneous.

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[23] At a minimum, the fact that the Department has publicly explained its policy shift on grounds that it had privately repudiated creates an issue of fact concerning the Department's true motives in adopting its discriminatory policy. In view of the fact that the Department has so far successfully resisted all efforts to take discovery, there is no basis to affirm the district court's grant of summary judgment. Accordingly, should this Court conclude that the Department's actions were authorized under the INA and the Constitution, and that the present record does not permit it to conclude that the 1993 policy shift violated the APA, the Court should remand for further proceedings on the issue whether the Department's policy shift was arbitrary and capricious.

A. The INA Does Not Preclude Judicial Review of Unlawful State Department Action.

The APA authorizes a reviewing court to "hold unlawful and set aside agency action . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional . . . power [or] (C) in excess of statutory authority." 5 U.S.C. § 706(2). Under the APA, this right of review is made available to any "person . . . adversely affected or aggrieved by agency action." 5 U.S.C. § 702.

1. Respondents are authorized to seek APA review under the INA.

The Department does not argue that the INA precludes judicial review of challenges by American citizens who are adversely aggrieved by State Department action that keeps them separated from their family members. Instead, the Department contends in a footnote (at 35 n.25) that American citizens who, like Mr. Vo, seek to reunite with their family members are not within the zone of interest protected by the INA because any interest they have "ends with the processing of their [IV] petition by the INS." In order to establish this claim, the Department must show that Mr. Vo's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). This it cannot do.

As we have shown (at 26 & n.15 *supra*), one of Congress' principal purposes in removing race and nationality as a bar to immigration was to ensure that "American citizens be accorded equal consideration in bringing their loved ones here." Similarly, in giving sponsorship rights to American citizens, Congress intended to give those citizens the right to physically reunite with their family members (so long as those family members meet the eligibility requirements for an IV) in this country, not merely to give them a meaningless piece of paper from the INS. *See* pp. 25-26 & n.15 *infra*. If the INS grants their petitions but the State Department prevents their reunion by its unlawful policy governing issuance of visas, those Americans are deprived of their statutory right. The interests of American citizens, like Mr. Vo, are far more than "marginally related" to Congress' purposes and

they, thus, have standing to challenge agency actions interfering with the issuance of immigrant visas for their alien relatives.

The Department does not contest that Ms. Vo was "adversely affected or aggrieved" by its action in refusing to process her IV application in Hong Kong. Yet the Department asserts (at 30) that because Ms. Vo is "an alien residing abroad," the APA's "generous review provision" is unavailable to her. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955). Nothing in the APA or the INA, however, suggests a congressional intent to preclude APA review to aliens outside our borders. The APA provides a cause of action to any "person" aggrieved by agency action. 5 U.S.C. § 702. It "does not say 'any citizen'. It does not say 'any person physically present in [the] United States'. . . . The emphasis is on the breadth of coverage." *Estrada v. Ahrens*, 296 F.2d 690, 694 (5th Cir. 1961). Applying the plain language of the APA, both this Court and the courts of appeals have routinely entertained APA challenges brought by aliens residing abroad who, like Ms. Vo and her U.S. citizen father, are adversely affected by agency action.[24]

2. The APA's strong presumption in favor of judicial review applies to agency action under the INA.

"From the beginning," this Court has recognized that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967). Thus, in considering whether the INA precludes review of respondents' claims, this Court must "begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

[24] *See, e.g., Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (reviewing challenge by non-resident Haitian boat people to INS repatriation policy); *Jean v. Nelson*, 472 U.S. 846 (1985) (reviewing challenge by excludable Haitians to INS parole policy); *Mulligan v. Schultz*, 848 F.2d 655 (5th Cir. 1988) (entertaining challenge by nonresident aliens to validity of regulations pursuant to which U.S. consular officers refused to accept their IV applications); *Silva v. Bell*, 605 F.2d 978, 984-85 (7th Cir. 1979); *De Avilla v. Civiletti*, 643 F.2d 471 (7th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981); *Constructores Civiles de Centroamerica, S.A. (Conica) v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972); *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993); *DKT Memorial Fund, Ltd. v. A.I.D.*, 691 F. Supp. 394, 399-400 (D. D.C. 1988), *aff'd in pertinent part and rev'd in part*, 887 F.2d 275, 281-82 (D.C. Cir. 1989); *People of Saipan by Guerrero v. United States Dep't of Interior*, 356 F. Supp. 645, 653 (D. Haw. 1973), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

Soon after the enactment of the INA in 1952, this Court ruled that administrative decisions under the INA made both in the context of deportation *and exclusion* are reviewable under the APA. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); *Brownell v. Tom We Shung*, 352 U.S. 180, 184 (1956). "The teaching of those cases is that the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the [INA] in the absence of clear and convincing evidence that Congress so intended." *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). Following this teaching, this Court has repeatedly applied the strong presumption of APA reviewability in cases arising under the INA. *See, e.g., Reno v. Catholic Social Servs.*, 509 U.S. 43, 63-64 (1993); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Jean v. Nelson*, 472 U.S. 846 (1985). In *McNary*, for example, this Court declared that the INA's restrictions on judicial review of individual adjudications must not be read to preclude judicial review of constitutional and statutory challenges to general policies and procedures affecting the rights of aliens, in "the absence of clear congressional language mandating preclusion." 498 U.S. at 483-84.

Stubbornly unwilling to accept the "teaching of [these] cases," the Department argues (at 20,28) that "the usual presumption in favor of judicial review does not operate" here because "this case involves the power of exclusion." The Department cites a series of cases decided prior to the enactment of both the APA and the INA. The APA, however, ensured reviewability of all agency action "except to the extent" that the statute at issue "preclude[s] judicial review." 5 U.S.C. § 701(a). In *Tom We Shung*, this Court, noting that absent "clear language or supersedure the expanded mode of review granted by [the APA] cannot be modified," squarely rejected the notion that this presumption of judicial review is somehow inapplicable to a case involving the power of exclusion. 352 U.S. at 185.

Apart from predating the APA, the Department's citations do not even relate to the type of challenge to agency action that is at issue here and that is the subject of APA review. Rather, these cases deal almost exclusively with constitutional challenges to the authority of *Congress* to make rules concerning the admission and exclusion of aliens, and stand only for the proposition that such *congressional* action is "largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953). However, unlike Congress, to which "the formulation of [immigration] policies is entrusted exclusively," *Galvan*, 347 U.S. at 531, the State Department enjoys no such immunity. Long before the enactment of the APA and the INA, this Court had recognized in cases involving the exclusion of aliens that it is within "the province of the courts . . . to prevent abuse" of the authority delegated to administration officials by Congress. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920); *accord Gegiow v. Uhl*, 239 U.S. 3, 9-10 (1915). The Department's "discretion over the admission and exclusion of aliens . . . extends only as far as the statutory authority conferred by Congress" *Abourezk*, 785 F.2d at 1061. *See* pp. 29-30 *supra*.

Unable to cite any relevant immigration authority, the Department baldly asserts (at 19) that the presumption in favor of judicial review "runs aground" in this case because it arises in the context of foreign affairs. This Court, however, has held that it must not "shirk [its] responsibility" under the Constitution to interpret the law "merely because [its] decision may have significant political overtones" or touch upon the conduct of foreign policy. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). As Justice White explained in *Japan Whaling*, when an action "presents a purely legal question of statutory interpretation," a "separate indication of congressional intent to make agency action reviewable under the APA is not necessary" even if significant foreign policy interests, including U.S. commitments under an international agreement, are involved. *Id.* at 230 and n.4. "[I]nstead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of a legislative intention to preclude review."

Id.; *see also Baker v. Carr*, 369 U.S. 186, 211 (1962) (it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").[25]

3. The Department cannot demonstrate by "clear and convincing evidence" that Congress intended to preclude review of its unlawful policy.

As the Department acknowledges (at 27), no provision in the INA expressly limits judicial review of the Department's policies and procedures affecting aliens outside the United States. The INA, "far from precluding review, affirmatively provides for it" in 8 U.S.C. § 1329, which provides that "'the district courts . . . shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter.'" *Abourezk*, 785 F.2d at 1051. The Department's argument (at 33) that this provision is jurisdictional and creates no cause of action misses the point. The "courts have reasonably inferred from this broad grant of jurisdiction that 'clear and convincing evidence' of a congressional intent to preclude judicial review [in immigration matters] is lacking." 785 F.2d at 1050.

The absence of explicit language prohibiting review of the Department's visa issuance policy stands in stark contrast to provisions of the INA that specifically preclude judicial review of certain other types of agency actions. *See, e.g.*, 8 U.S.C. § 1160(e)(1), 8 U.S.C. § 1254a(b)(5)(A), 8 U.S.C. § 1255a(f)(1). Given the presumption that "Congress acts intentionally" when it "includes particular language in one section of a statute but omits it in another," the existence of these provisions virtually compels the conclusion that Congress intended to make reviewable the

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[25] The Department's citation to *Department of Navy v. Egan*, 484 U.S. 518 (1988), is inapposite. That case involved the issuance of a security clearance, "a sensitive and inherently discretionary judgment call [which] is committed by law to the appropriate agency of the Executive Branch." 484 U.S. at 527. The basis for the Court's ruling that the normal presumption of judicial review did not operate in that context was that the power of the executive to classify or control access to national security secrets flows from his role as Commander in Chief and "exists quite apart from any explicit congressional grant." *Id.* This case, by contrast, concerns an agency's abuse of delegated power that is entrusted exclusively to Congress—the review of which is, of course, a time honored judicial function.

Department's polices and procedures. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

Unable to rely on any expressed preclusion of judicial review in the INA, the Department argues that Congress impliedly precluded judicial review of the type of challenge at issue in this case from: (1) a judicial invention known as the doctrine of "consular nonreviewability" and, (2) § 1105a of the INA, which restricts the forms of review that can be had from final orders of exclusion and deportation. Nothing could be further from the truth.

The consular nonreviewability doctrine insulates from judicial review the decision of a consular officer whether to grant or deny a particular visa.[26] That doctrine has no application to this case, because it does not involve the decision of a consular officer to grant or deny a particular visa. Rather, this case involves a general policy decision that, as the U.S. Consulate explained to the HKG, came "from the Department of State in Washington, D.C.", instructing the Consulate that it "may not process the immigrant visa request of anyone awaiting a screening decision [or] screened-out as a refugee." JA 78-79. It is well established that the consular nonreviewability doctrine does not preclude challenges to the regulations, policies, practices or "decisions of State Department officials rather than consular officers abroad" that relate to visa matters. *Abourezk*, 785 F.2d at 1051 n.6.[27]

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[26] The doctrine, which has never been sanctioned by this Court, applies without regard to whether the alien visa applicant is located in the United States or abroad. *See, e.g., London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

[27] *See, e.g., Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (the "principle that 'decisions of United States consuls on visa matters are nonreviewable' . . . is inapplicable" to cases in which the aliens are "challenging the authority of the Secretary of State" to promulgate regulations which prevented consular officers from "accept[ing] their applications for immigration visas"); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); *International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C.Cir. 1985) (cases "concern[ing] challenges to a decision by a consular officer on a particular visa application . . . ha[ve] no application here because . . . the general Operations Instructions promulgated by the INS violate the pattern set forth in [the INA]").

Acknowledging (at 33-34) that the consular nonreviewability doctrine does not by itself preclude review in this case, the Department falls back on 8 U.S.C. § 1105a(b), which provides that aliens subject to "a final order of exclusion . . . may obtain judicial review of such order by habeas corpus proceedings and not otherwise." The Department reckons (at 29) that the enactment of this exclusive means of judicial review for aliens subject to final orders of exclusion somehow "indicates that [Congress] intended to preclude APA review at the behest of aliens residing abroad." The Department's argument is utterly baseless. Section 1105a does not *preclude* judicial review of anything. Intended to address the specific problem of repetitive and dilatory actions brought by individual deportable or excludable aliens,[28] § 1105a simply eliminated a "particular mode of APA review. . .—an action for injunctive relief in federal district court" and "replaced it with direct review in the courts of appeals" in deportation cases and habeas corpus review in the district courts in exclusion cases. *I.N.S. v. Doherty*, 502 U.S. 314, 330 (1992) (Scalia, J., concurring in the judgment and dissenting in part). As Justice Scalia observed in his opinion in *Doherty*, "*Pedreirio* remains the law," *id.*, as does the "teaching" of *Tom We Shung* that the APA's presumption of judicial review is fully applicable to exclusion decisions.

Both this Court and the courts of appeals have consistently held that no broad preclusion of judicial review can be inferred from § 1105a, which is limited to the review of formal deportation and exclusion orders.[29] The precedents of this Court clearly

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[28] The "fundamental purpose" of § 1105a was to "frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation [and exclusion] were forestalling departure by dilatory tactics in the courts." *Foti v. I.N.S.*, 375 U.S. 217, 224 (1963); *see also* H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23 (1961).

[29] *See, e.g., Cheng Fan Kwok v. I.N.S.*, 392 U.S. 206, 214 (1968) ("[i]n situations to which the provisions of [1105a(a)] are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court"); *Rafeedie v. I.N.S.*, 880 F.2d 506, 510-513 (D.C.Cir. 1989) (§ 1105a(b) does not apply to summary exclusion orders under 8 U.S.C. § 1225(c)); *Jean v. Nelson*, 711 F.2d 1455, 1505 n.57 (11th Cir. 1983), *overruled*

establish that § 1105a(a) does not in any way limit the ability of aliens either within or without the territory of the United States to seek judicial review of a systemic challenge to agency policies or procedures (as opposed to individual deportation and exclusion orders). In *McNary v. Haitian Refugee Centers*, for instance, plaintiffs brought a class action alleging that INS procedures under an amnesty program violated the INA and the Constitution. As the Department does here, the INS in *McNary* argued that plaintiffs' statutory and constitutional challenges were foreclosed by virtue of a provision in the INA precluding "judicial review of a determination respecting an application for adjustment of status" except in "the judicial review of an order of exclusion or deportation . . . under section 1105a." 498 U.S. at 486. Applying the "well-settled presumption favoring . . . judicial review of administrative action," this Court interpreted the reference to a determination as "describing the denial of an individual application . . . rather than the practices and policies used by the agency in processing applications." *Id.* at 496, 492. The Court held that a "general collateral challenge" to such illegal policies and practices was reviewable under the INA. *Id.*; *see also Reno v. Catholic Social Servs.*, 509 U.S. at 55-56; *Jean v. Nelson*, 472 U.S. at 847, 853, 857 (holding that INS officials are "bound by the provisions of the [INA] and of the regulations" and remanding to the district court to determine whether those officials exercised their "broad discretion" to deny parole under the INA and the regulations "without regard to race or national origin").

The crux of the Department's arguement (at 29) is that permitting judicial review in this case would create a supposed anomaly in which aliens outside the United States would be able to take advantage of avenues of judicial review that are unavailable to aliens in exclusion proceedings. This supposed anomaly, however, does not exist: Aliens inside the United States in exclusion proceedings can challenge individual decisions ordering their exclusion by bringing a habeas corpus proceeding (but not by an APA action). Aliens outside the United States (or

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in part by 727 F.2d 957 (11th Cir. 1984), *aff'd* 472 U.S. 846 (1985) ("§ 1105a is inapplicable altogether if the asserted claim is unrelated to exclusion hearings").

for that matter aliens inside the United States) cannot challenge the decisions of individual consular officers denying them admission to this country by virtue of the doctrine of consular nonreviewability.[30] But both aliens inside and outside our borders may seek APA review of generally applicable State Department regulations, policies and procedures that adversely affect or aggrieve them.

In the end, the Department urges this Court to ignore the APA and the INA and, instead, to craft a judge made doctrine barring judicial review of any decision the Department may make that relates to the admission of aliens from abroad. Under the Department's proposal, the federal courts could not review a Department decision to replace or modify the allocation system and family preference categories set up by Congress with a new immigration program in which admission is based on considerations of race, national origin and sex. It is inconceivable that this was the intent of Congress when it enacted the APA's broad grant of, and the INA's narrow limitations on, judicial review.

B. The Department's Unlawful Conduct Has Not Been Committed To Its Discretion.

The Department argues that its discriminatory policy of refusing to process the IV applications of Vietnamese nationals is "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). This Court has described this exception to judicial review as "a very narrow" one, "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve*

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[30] The Department places much reliance on a single line of dictum in a footnote in *Tom We Shung*, in which the Court stated that its opinion did not suggest that a nonresident alien "may avail himself of the declaratory judgment action by bringing the action from abroad." 352 U.S. at 184 n.3. Taken in context, that sentence is clearly a reference to the rule barring review of the decision of a consular officer denying an alien admission to this country. The Court was not addressing the case of respondents who, rather than challenging an individual exclusion decision, are challenging the lawfulness of an agency policy of general application.

Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (citing S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)).

The Department asserts that 8 U.S.C. § 1202(a) commits to its unfettered and nonreviewable discretion all matters relating to the admission of aliens. Section 1202(a), however, simply provides that visa applicants must apply in consular districts as the Secretary "by regulation" specifies. The Department claims (at 36) that because § 1202(a) "itself establishes no substantive standards for the exercise of the consular venue authority," its decisions in this area are committed to its discretion by law. Were broad grants of rulemaking authority committed to agency discretion within the meaning of § 701(a)(2), however, nonreviewability based on § 701(a)(2) would be the rule, rather than the "very narrow" exception it is. The Department's rulemaking authority under § 1202(a) does not exist in a vacuum, but rather in the overall context of the INA, including the prohibition on nationality-based discrimination in the issuance of immigrant visas.

The Department's argument is based on the false assumption that 8 U.S.C. § 1152(a)(1) does not apply to its discriminatory visa processing policy. If (as we demonstrated above) that section is applicable, then there is a "law to apply." The "statutory command" prohibiting discrimination in the issuance of an immigrant visa "does not commit such [discrimination] to the Secretary's discretion." *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986).

Even assuming the inapplicability of § 1152(a)(1), the Department is wrong when it asserts that this case presents one of those "rare circumstances where the relevant statute has been "'drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In *Chaney*, this Court distinguished the situation when an agency exercises its discretion negatively in failing to undertake enforcement action, which is "generally committed to agency action," and the situation in which the agency does act. 470 U.S. at 831. In the latter case, the Court found that the affirmative:

> action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.

Id. at 832. The decision of the Department to refuse visa processing in Hong Kong is an affirmative act that can be reviewed to determine not only whether it was unauthorized by or contrary to law, but also to determine whether it was arbitrary and capricious.

The Department is unable to show that "Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard for gauging the Secretary's exercise of discretion." *Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring). As we have explained (at 33-34 *supra*), the legislative history of the INA establishes that Congress did not rely upon the Secretary's "mental processes" when it enacted § 1202(a), but instead had clear objective criteria in mind applicable to the determination of consular venue. Under those criteria, which were embraced in the Department's regulations for more than four decades before it adopted its discriminatory policy in 1993, the guiding rule was that "the consular district of the applicant's . . . foreign residence . . . is the *only* post *required to accept* the case for processing, although some other post might do so as a matter of discretion." FAM § 42.61, N.2.1. (emphasis added).[31] Throughout the protracted course of this litigation, the Department has been unable to cite a single instance in which it has departed from this practice. Nor has it been able to cite a single instance in which it has found it necessary to discriminate against a class of aliens on the basis of nationality in making its consular venue determinations.[32]

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[31] For nearly 30 years since 1966 (see note 19 *supra*), the Department's regulations also required that an alien's visa be processed in the place in which the alien is physically present. Where an alien was neither physically present nor resident in a consular district, the regulations authorize visa processing in another consular district in accordance with simple objective criteria that have been in place since the adoption of the INA. FAM § 42.61, N.2.2. Thus, contrary to the Department's assertion (at 37), the determination of consular venue involves no "complicated balancing" of factors.

[32] The Department does note that it has special rules directing applicants from countries in which there is no consular office to other countries for visa processing. Because no applicant can apply for a visa in a country with no

Review of an agency's sudden and unexplained departure from a long-standing practice, initiated to honor an express statement of congressional intent, is clearly within the competence of the federal courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1996

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consular office, these rules necessarily apply to all visa applicants who live in such countries, regardless of their nationality. While the Department also asserts, without explanation or support, that consular venue determinations are often based on security concerns, it can come up with no case in which it has found it necessary based on such concerns to institute a discriminatory consular venue rule requiring that all aliens of a given nationality apply for an IV at a particular consular office.

STATUTORY APPENDIX

Constitution

U.S. CONST. Amend. V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statutes

5 U.S.C. § 702. Right of review.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine

the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8 U.S.C. § 1152(a) (subsequent to 1965 amendment):

(a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), and 1153 of this title: *Provided*, That the total number of immigrant visas and the number of conditional entries made available to natives of any single foreign state under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year: *Provided further*, That the foregoing proviso shall not operate to reduce the number of immigrants who may be admitted under the quota of any quota area before June 30, 1968.

8 U.S.C. § 1152(a)(1) (1996) (as currently in effect):

(a) Per country level

(1) Nondiscrimination

Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Regulations

22 C.F.R. § 42.61(a) (1993)

Under ordinary circumstances, an alien seeking an immigrant visa shall have the case processed in the consular district in which the alien resides. The consular officer shall accept the case of an alien having no residence in the consular district, however, if the alien is physically present and expects to remain therein for the period required for processing the case. An immigrant visa case may, in the discretion of the consular officer, or shall, at the discretion of the Department, be accepted from an alien who is neither a resident of, nor physically present in, the consular district. An alien residing in the United States is considered to be a resident of the consular district of last residence abroad.

22 C.F.R. § 42.61(a) (as amended on August 1, 1994, 59 Fed. Reg.39,955)

Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over the area if the alien can establish that he or she will be able to remain in the area for

the period required to process the application. Finally, a consular office may, as a matter of discretion, or shall, at the direction of the Department, accept an immigrant visa application from an alien who is neither a resident of, nor physically present in, the area designated for that office for such purpose. For the purposes of this section, an alien physically present in the United States shall be considered to be a resident of the area of his or her last residence prior to entry into the United States.